

BEFORE THE INVESTIGATIVE PANEL OF THE
FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A)
JUDGE, NO. 02-487)
_____)

JUDICIAL QUALIFICATION COMMISSION'S RESPONSE
TO MOTIONS IN LIMINE

Introduction

This memorandum is submitted as a single response to the Respondent's ten motions in limine.¹

First, it should be noted that the Commission has discretion in determining whether to rule on the motions prior to the trial or to rule on the admissibility of the evidence when it is actually offered. Charles W. Ehrhardt, Florida Evidence § 104.5 (2004). Thus Ehrhardt states that "a judge [or the commission] should not be required 'to guess that a generally phrased pretrial objection is still valid in the shifting pattern of the actual trial.'" Id. at § 104.5.

¹ The issues raised in the Motions in Limine are also raised by Respondent as objections to exhibits as required by the Commission's order of June 18, 2004.

Ehrhardt cites McCallister v. State, 779 So.2d 615 (Fla. 5th DCA 2001) and quotes from the case that

A trial court's pre-trial ruling on a motion in limine is tentative because the shifting sands of the trial in progress may cause a trial judge to rethink an earlier evidentiary ruling based on a maturing understanding of the case.

779 So.2d at 615-16.

Response Motion in Limine to Exclude All Documents
Provided by the United States Air Force

During the investigative stage of these proceedings, a subpoena was served upon the United States Air Force for records of its investigation of the plagiarism charge against Respondent which subpoena stated:

The Judicial Qualifications Commission, is an agency of the State of Florida vested by Article 5, Section 12, of the Constitution of the State of Florida, with jurisdiction to investigate and recommend to the Supreme Court of Florida the discipline of a judge whose conduct warrants such discipline and the law enforcement purpose of this subpoena is to assist in an investigation by the Judicial Qualifications Commission of whether, based upon the alleged plagiarism, Colonel Gregory P. Holder is fit to retain the office of Circuit Judge of the Thirteenth Judicial Circuit of

Florida or should otherwise be
disciplined for such conduct.

A copy of the subpoena is attached to the Respondent's motion.

Judge Holder claims that the production of the Air Force's investigative records violates his right of privacy because the Commission misrepresented itself as a law enforcement entity when, in fact, it is "a disciplinary body commissioned by the Florida Supreme Court and is neither a criminal not a civil law enforcement entity." (Motion, p. 2). The subpoena accurately states the power and authority of the Commission. The Commission is empowered to investigate and recommend the discipline of Florida judges who violate the law or the Code of Judicial Conduct, Article V, Section 12, Florida Constitution, State ex rel. Turner v. Earle, 295 So.2d 609 (Fla. 1974). This is a proper law enforcement purpose which satisfied the Air Force requirement for the release of privacy information.

In addition, the Respondent, but by his conduct, has waived any right of privacy in this matter.

First, the Commission, in its initial response on August 8, 2003 to Rule 12(B) discovery request, identified Colonel

David M. Leta, the Air Force officer who conducted the Air Force's investigation, as a person it anticipated to call as a witness and produced copies of affidavits and transcripts of testimony obtained by Colonel Leta in his investigation. Thus, the Respondent was on notice from the outset that the Commission had access to the Air Force's investigative report, but took no action before either of the prior two settings of the hearing in this matter.

Second, the Respondent on January 5, 2004, served a motion to dismiss the charges on the ground that the Air Force "having fully considered all of the evidence, restored Colonel Holder's designation as Judge Advocate" (motion, ¶ 7) and again relies on the reinstatement by the Judge Advocate General and affidavits obtained by Colonel Leta in the Air Force's investigation. The Respondent has no right to affirmatively seek relief before the Commission upon the evidence presented in the Air Force investigation and at the same time assert a right of privacy as to that evidence.

Respondent's Motion in Limine to Exclude Copies
of the Purported Holder Paper on Authentication Grounds

Respondent seeks to obtain a pretrial ruling that Exhibit "A" to the Notice of Formal Charges, which is the plagiarized

paper Judge Holder is charged with having submitted to the Air War College as his own work (the "Holder Paper"), is not authentic, that is, that it is not the paper submitted to the Air War College by Judge Holder in 1998. The Respondent cites Section 90.901 of the Florida Evidence Code that "authentication or identification of evidence is required as a condition precedent to its admissibility." (Memorandum ¶ 2). Assistant United States Attorney Jeffrey Del Fuoco (Del Fuoco), who is a Major in the Army Reserve attached to the Legal Support Organization of the 81st Regional Readiness Command in St. Petersburg, Florida, has and will testify that he on either Saturday, January 12 or Sunday, January 13, 2002 found copies of the Holder Paper as well as a paper prepared by David Hoard in 1996 and sent by facsimile to Judge Holder in December, 1997 (the Hoard Paper) on the floor of his office at the Army Reserve Center. Del Fuoco has and will testify that he locked the papers in his briefcase and took them home, on Monday, January 14, 2002, took them to the United States Attorney's Office where he opened an official government file, placed the documents in the file and that the documents were then delivered to Assistant United States Attorney Jeffrey Downing, Deputy Chief of the U.S. Attorney Public Corruption Section on October 21, 2002. Downing has and will testify

that the file was assigned to him on October 21, 2002 which file contained the two papers he received from Del Fuoco and that he retained the documents in the official government file until they were produced at Downing's deposition on August 31, 2004, at which time they were delivered to the custody of the undersigned Special Counsel to the Commission. On this basis, the Hoard and Holder Papers will be offered in evidence as having been properly identified as the papers in question. The central issue in the case then will be whether the Holder Paper is in fact the paper submitted by Judge Holder to the Air War College, the resolution of which is determinative of whether the charges are proven.

The authenticity of a document may be established by circumstantial evidence, State v. Love, 691 So.2d 620 (Fla. 5th DCA 1997); ITT Real Estate Equities, Inc. v. Chandler Ins. Agency, Inc., 617 So.2d 750 (Fla. 4th DCA 1993), and in this case, circumstantial evidence clearly authenticates the Holder Paper as the paper submitted by Judge Holder to the Air War College.

A summary of this circumstantial evidence as follows²:

² This is not intended to be a complete or exhaustive statement of the evidence, but to show a prima facie basis to

1. Lieutenant Colonel Hoard has identified the "Hoard Paper" as one he prepared and submitted to the Air War College in 1996.

2. At Judge Holder's request, Hoard faxed his paper to Judge Holder on September 5, 1997 "Per your request." Judge Holder has admitted receiving the Hoard Paper.

3. On the first page of the Hoard Paper, the 5th Edition of the Air War College Program is crossed out and the 8th Edition handwritten in, E. David Hoard's name is crossed out and Lt. Col. Gregory P. Holder USAFR is handwritten in, Hoard's address is crossed out and beside written "our address," Seminar #080G is crossed out and the number 059B is written in, and the date January 19, 1996 is crossed out and 1998 handwritten in.

4. Judge Holder has admitted that the handwritten changes on the Hoard Paper are his.

5. Judge Holder took the Air War College course, 8th Edition, Seminar No. 059B at McDill Air Force Base, Tampa, Florida in the academic year 1997-1998.

establish that the Holder paper is what it purports to be.

6. A research paper due January 5, 1998 was required to complete the course.

7. Fourteen officers signed up to take the course with Judge Holder. Judge Holder wrote on the topic, "An Analysis of the Anglo-American Combined Bomber Offensive in Europe During World War II, 1942-1945."

8. Judge Holder is the only student who wrote on the topic of the combined bomber offensive in Europe during World War II and has admitted that it is his signature on the certificate certifying that he did not use another student's research work and the paper represented only his own work.

9. Judge Holder's paper with a copy on a disc was received by the Air War College on or about January 8, 1998 and there is a notation on Judge Holder's records that the disc could not be read. The original, after being graded, was returned to Judge Holder and therefore the Air War College has no copy of the paper submitted by Judge Holder.

10. The Holder Paper was graded by Lieutenant Colonel William Howe, who has identified his handwriting throughout the Holder Paper as his.

11. The academic year 1997-1998 was the only year that Lieutenant Colonel Howe was at the McDill Air Force Base Seminar Faculty Advisor responsible for grading the papers from the McDill Air Force Base Seminar.

12. In 1997-1998, Loraine Nesco was Judge Holder's judicial assistant, and has claimed that she typed the paper submitted by Judge Holder to the Air War College.

13. At the time the paper was being prepared, Judge Holder was moving from the juvenile to the civil division of the Circuit Court. It was chaotic and everyone was under a great deal of stress.

14. Computer staff at the Hillsborough County Courthouse conducted a search of the courthouse computer network and found that the Hoard Paper had been typed, using Ms. Nesco's computer on December 5, 1997 and has been preserved on the computer backup tapes beginning with the backup tape dated for the year 1998.

15. The courthouse keeps backup tapes for only five years and there is no backup tape for 1997.

16. The approximately ten pages of the twenty-page research paper submitted by Judge Holder were incorporated verbatim from the Hoard Paper on the County Courthouse computer hard drive to the Holder Paper.

17. On January 4, 1998, which was a Sunday, at 8:10 p.m., a file was created on Judge Holder's computer in his Chambers and titled "AWCPAPER." The file has been retained on the courthouse backup tapes. There is now nothing in the file which is consistent with a paper having been created in the file, transferred to a disc, and then deleted.

18. Judge Holder is very competent with respect to creating documents on a computer.

19. Ken Lawson, another Assistant United States Attorney, and a member of the Army Reserve was given by Judge Holder or a member his staff a copy of Judge Holder's paper, a paper written by someone else and Judge Holder's course materials.

20. Lawson gave the papers which he received from Judge Holder to Del Fuoco who was considering taking the Air War College course.

21. In October of 2003, Del Fuoco, when searching for some of his military records, found the papers given to him by Lawson, which included Judge Holders' course materials and copies of two Air War College papers, one from Mary Perry who took the course at the same time as Judge Holder and a copy of the Hoard Paper which appears to be the same as the one slipped under Del Fuoco's door that initiated the investigation.

These facts, some of which are disputed, create a strong circumstantial case that Exhibit "A" to the formal charges is the paper submitted by Judge Holder to the Air War College. While the witnesses will be subject to cross-examination and the evidence subject to challenge, it should be abundantly clear that the case must be resolved by the Commission after hearing all of the evidence and not on a motion in limine.

**Respondent's Motion in Limine to Exclude Evidence
on Best Evidence Grounds**

The Respondent seeks to exclude from evidence copies of the Holder Paper, because it is a copy, not the original, and therefore not the best evidence.

Section 90.952 of the Florida Evidence Code provides that "except as otherwise provided by statute, an original writing . . . is required in order to prove the contents of the writing"

Judge Holder has testified that both his paper and Hoard's paper were kept in a drawer in his desk at the courthouse until Judge Holder discovered some time in 2001 that the papers were missing. Thus, neither the Commission nor the Respondent has the original of the paper. In these circumstances, Section 90.954 provides that a copy is admissible where "all originals are lost or destroyed," unless, as claimed by the Respondent, under Section 90.953, a genuine question is raised about the authenticity of the original. As discussed above with respect to the issue of authenticity, the question of whether Exhibit "A" to the Notice of Formal Charges is the paper submitted by Judge Holder to the Air War College is not an evidentiary issue, but the ultimate issue in the case which cannot be resolved on a motion in limine.

The Respondent states in his motion that the Commission has admitted that "it has no witness who can testify based upon personal knowledge that the copies of the purported

Holder paper 'could not have been fabricated through the use of existing computer and/or other technology or techniques" (Motion, p. 9). Respondent fails to point out the remainder the Commission's Response to the request for admission "that [the] circumstantial evidence will establish by clear and convincing evidence that Exhibit 'A' was not fabricated, but is an authentic copy of the actual paper the respondent submitted to the Air War College in January 1998." (Response to Request for Admission ¶ 16 filed October 22, 2003.)

**Respondent's Motion in Limine to
Exclude Evidence on Due Process Grounds**

The Respondent has filed a motion in limine to exclude evidence on due process grounds, with a supporting memorandum. A review of the memorandum will disclose that it is nothing more than Judge Holder's argument in support of his contention that Exhibit A to the Notice of Formal Charges is not his paper and that the paper is the product of a conspiracy against Judge Holder because he was cooperating with the FBI in an investigation into court system corruption (Motion p. 4). The motion is not in reality based upon due process grounds but is in effect a motion for summary judgment. The Respondent, however, does not contend that there are no

disputed issues of fact and, as discussed, with respect to the authenticity issue infra, there is strong circumstantial evidence that the paper is Holder's.

Again, the Respondent claims that the Commission has admitted that it "has no witness who can testify based on personal knowledge that [the purported Holder paper] is an authentic copy of the actual paper that respondent submitted to the Air War College in January 1998" (Motion p. 6). Again, Judge Holder fails to quote the remainder of the response to the request that the "circumstantial evidence will establish by clear and convincing evidence that Exhibit 'A' to the Notice of Formal Charges is a copy of the paper submitted by the respondent to the Air War College." (Response to Request for Admissions ¶ 1 filed October 22, 2003.)

Significantly, Judge Holder relies upon evidence obtained during the Air Force investigation and the fact that he was reinstated as a Judge Advocate (Motion, p. 5) at the same time complaining that the Commission violated his right of privacy by obtaining the evidence developed by the Air Force. See Response to Motion to Exclude Documents Provided by United States Air Force, *supra*.

Judge Holder contends that the paper lacks the usual hallmarks of one submitted to the Air War College, claiming that it is missing a received stamp and concluding comments and the student's grade at the end. As to these points, it is quite evident from the paper that there is a date stamp mark and Lieutenant Colonel Howell's grading of the Mary Perry paper from the same semester also lacks comments or a grade.

Finally, the Respondent contends that the Commission should exclude the paper on due process grounds because the paper "is inconsistent with Judge Holder's writing style" and "plagiarism is inconsistent with Judge Holder's character." (Motion, p. 9.) Judge Holder would have the Commission decide the case on affidavits, the admissibility of which are challenged by the Commission's Special Counsel and the believability of witnesses which the Commission has not heard. The charges, however, must be resolved based upon the evidence and the documents submitted at the hearing.

**Respondent's Motion in Limine to Exclude
Testimony of David Leta**

The Respondent has moved to exclude the testimony of Colonel Leta on the ground that the Department of Defense

refused Judge Holder's request to depose Leta unless Judge Holder disclosed work product. (Motion, p. 2.)

The Respondent noticed Colonel Leta's deposition for October 30, 2004, but following a discussion with the Commission's Counsel as to the scope of testimony to be offered by Colonel Leta at the hearing, voluntarily cancelled the deposition. In addition, attached to the motion as a letter from the Air Force advising the Respondent's counsel of what was required under Federal Regulations to obtain Colonel Leta's testimony, and noting that the required information had not been provided. There is, therefore, no basis for excluding Colonel Leta's testimony at the trial.

**Respondent's Motion in Limine to
Exclude Statement of Colonel Gregory P. Holder**

The Respondent has moved to exclude his statement taken by Colonel Leta, March 7, 2003.

First, Respondent objects on the ground that Colonel Leta's testimony should be excluded and therefore the transcript of the interview cannot be authenticated (Motion, pp. 2-3). As discussed with respect to the motion to exclude Colonel Leta's testimony, the testimony should be admitted.

Second, the Respondent contends that the transcript of the statement contains Colonel Leta's factual recitations and opinions (Motion, p. 3). Respondent does not point out what factual recitations and opinions he is challenging, but to the extent there are factual recitations or opinions, the objections can be raised at the time the statement is offered in evidence.

Finally, the Respondent contends that the tape recording from which the statement was transcribed is the best evidence. With respect to this objection, Special Counsel will undertake to either obtain the tape or establish the admissibility of the transcription under Section 90.954 of the Evidence Code.

**Respondent's Motion in Limine to Exclude
Testimony of Jeffrey John Del Fuoco**

Judge Holder has moved to exclude the testimony of Del Fuoco on the ground that pursuant to 28 C.F.R. § 1621, et. seq., the United States Attorney for the Middle District of Florida has limited Del Fuoco's testimony to those facts which the JQC seeks to establish. (Motion, p. 2.)

Judge Holder took Del Fuoco's deposition on August 27, 2004, and was allowed to fully cross examine him on the

matters covered by the letter dated December 18, 2002 from Paul I. Perez, United States Attorney, to the undersigned Special Counsel. (A copy of the December 18, 2003 letter is attached to Respondent's Motion.) These are also the only matters identified in the Respondent's Amended Third Pre-Hearing Statement with respect to what testimony Judge Holder intends to elicit from Del Fuoco.

Also attached to the Respondent's motion is a letter dated December 8, 2002 from Judge Holder's counsel to James R. Klindt, First Assistant United States Attorney, regarding testimony of Mr. Del Fuoco, in which it is stated that "no information relating to or based upon material contained in the files of the Department of Justice or information acquired as part of the performance of Mr. Del Fuoco's duties is sought." The response from Mr. Perez (also attached) notes that Judge Holder did "not specify your areas of inquiry" and, therefore, did not allow any area of inquiry beyond that approval at the request of the Commissioner. For these reasons, Respondent has not shown how he has been prejudiced by any limitation placed upon Del Fuoco's testimony in this matter.

**Respondent's Motion in Limine to Exclude
All Documents Provided by Jeffrey John Del Fuoco**

Respondent has moved to exclude all of the documents Del Fuoco provided the Commission.

First, Judge Holder refers to his motion to exclude all of Del Fuoco's testimony and he concludes that without Del Fuoco's testimony the documents cannot be authenticated (Motion p. 3). For the reasons stated in response to Judge Holder's motion relating to exclusion of Del Fuoco's testimony, the motion should be denied.

Second, the "authenticity" issue that is whether Exhibit "A" to the Notice of Formal Charge is a copy of the paper submitted by Judge Holder to the Air War College is provable without regard to Del Fuoco's testimony (see Response to Motion to Exclude on Authenticity Grounds). As Del Fuoco has testified, he considered the papers he received as a "tip" which with investigation has established by clear and convincing evidence that Exhibit "A" is the plagiarized paper Judge Holder submitted to the Air War College.

**Respondent's Motion in Limine to Exclude
Testimony of Jeffrey Downing**

Judge Holder has moved to exclude the testimony of the United States Attorney, Jeffrey Downing, on the same grounds as he raised with respect to the testimony on Assistant U.S. Attorney Del Fuoco. And, for the reasons stated with respect to the motion to exclude Del Fuoco's testimony, should also be denied.

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Certificate of Service

I DO HEREBY CERTIFY that a copy of the foregoing Response to Motions in Limine has been furnished via Facsimile and United States Mail this ____ day of September, 2004 to the following:

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